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Issue Date: 02 December 2005

CASE NO.: 2004-LHC-01719
OWCP NO.: 01-154072

In the matter of:

MARK DESAUTELS
Claimant

v.

ELECTRIC BOAT CORP.
Employer/Self-Insured

Appearances:

Scott N. Roberts, Esq., Groton, Connecticut, for the Claimant

Conrad M. Cutcliffe, Esq., Cutcliffe, Glavin & Archetto, Providence, Rhode Island, for the Employer

Before: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. STATEMENT OF THE CASE

This case arises from a claim for worker's compensation benefits filed by Mark Desautels ("Claimant") against Electric Boat Corporation ("EBC" or "Employer") under the Longshore and Harbor Worker's Compensation Act ("LHWCA" or "the Act"), as amended, 33 U.S.C. § 901, *et. seq*. After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was held on October 14, 2004 in New London, Connecticut, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The

parties offered stipulations, and testimony was heard from the Claimant and a vocational expert, Micaela Black. Transcript ("TR") 5-8, 21-75, 77-103. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-8 and Employer's Exhibits ("EX") 1-7.[1] TR 10-12. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-6. TR 12-13. After the hearing, the parties submitted post-hearing briefs. The record is now closed.

My findings of fact and conclusions of law are set forth below.

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following: (1) the LHWCA applies to the case; (2) the Claimant was injured on September 24, 2001; (3) the injury occurred at the Employer's facility in Quonset Point, Rhode Island; (4) the injury arose out of the Claimant's course of employment with EBC; (5) there was an employer-employee relationship at the time of injury; (6) the Employer was timely notified of the injury; (7) the claim for benefits was timely filed; (8) Notice of Controversion was timely filed; (9) the informal conference in front of the OWCP occurred on April 4, 2004; (10) the Claimant's average weekly wage at the time of injury was $691.67; (11) the Claimant was paid worker's compensation benefits under the Act and under the Rhode Island Compensation Act. TR 5-6.

The preliminary issue is whether the Claimant is precluded by collateral estoppel from arguing that he is totally disabled, based upon a pre-hearing order of the Rhode Island Worker's Compensation Court. The second issue is whether the Claimant is partially or totally disabled under the Act.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The Claimant, Mark Desautels, was 44 years old at the time of the hearing. TR 21. The Claimant told two vocational rehabilitation experts that he did graduate from high school; *see* EX 1 at 1; CX 7 at 2; but testified at trial that he attended school until grade twelve, but never finished high school. TR 22, 58. The Claimant worked at EBC continuously from 1980 to the time of his injury in September 2001. TR 22. The Claimant started as an inside machinist in 1980. *Id*. The Claimant transferred to the pipe shop and became a pipefitter for five years. TR 24-25. Next, the Claimant became an outside machinist and also continued to do pipefitting. TR 25. In approximately 1999 or 2000, the Claimant went back to the machine shop on a temporary basis. TR 26.

The Claimant testified that he was injured on September 25, 2001, while operating the Vertical Turret Lathe, which he described as a very large machine. TR 27. The Claimant maintained that while he was operating the machine, the control panel malfunctioned. *Id*. He informed the supervisor of the malfunction, and the supervisor instructed the Claimant to finish

[1] EX 7 was submitted by agreement of the parties by mail on November 24, 2004.

the piece he was working on before the machine was turned over to the maintenance department. TR 27-28. The Claimant then went back to work on the piece, and the machine malfunctioned again. The Claimant testified that he "tried to shut the machine off in a panic…and I spun around to shut the machine off and that is when I popped my back out." TR 28. Immediately after the injury, the Claimant went to the dispensary, because he knew that he was injured. *Id*. After going to the dispensary, Claimant was released to go to the doctor, where he had x-rays done. TR 28-29. A week or two after the injury, the Claimant went to see a chiropractor, but found that the chiropractic therapy was making him feel worse, so he discontinued those sessions. TR 29. The Claimant testified that his symptoms at that time were "extreme low back pain, numbness in the legs, no feeling in the thigh, and difficulty walking or standing." TR 29-30. He was unable to work at this time. TR 30.

The Claimant began seeing Dr. William F. Brennan, Jr., who works with West Bay Orthopedic Associates, on November 7, 2001. CX 6 at 1-6. Dr. Brennan diagnosed the Claimant as having a lumbar strain, and recommended an exercise and stretching program, and ordered an MRI. CX 6 at 7. Based on the MRI, Dr. Brennan diagnosed degenerative disc disease. CX 6 at 9. In May 2002, the Claimant started a formal physical therapy program. CX 6 at 13-14. In July 2002, the Claimant was diagnosed with a "spinal instability." CX 6 at 17. On October 17, 2002, Dr. Brennan allowed the Claimant to return to work for light duty, instructing him not to lift or carry greater than ten pounds, not to repetitively bend or twist, and not to stand or sit for greater than thirty minutes without resting. CX 6 at 22.

The Claimant returned to work for a short period of time thereafter, but found that the work that was assigned to him was beyond his physical abilities. TR 30. The machinist job required bending and lifting, which "worked the disc back out" and forced the Claimant to stop working again. *Id*. After a time, the Claimant went back to EBC to work in the pipe shop. TR 31. At first, the Claimant was able to do jobs that did not require bending or heavy lifting. *Id*. A new supervisor, however, assigned the Claimant to a job in which he had to do overhead work with heavy equipment, and the Claimant re-injured himself. *Id*. At that point, the Claimant left work again. TR 32. In November 2001 or February 2002, the Claimant was asked to return for light-duty work in a firewatch position. *Id*. The Claimant worked in this position for four weeks before he was unable to continue due to difficulties walking on ice. TR 33.

Sometime after the Claimant left work for the last time, the Claimant and his doctor decided that other methods of improving Claimant's back, such as physical therapy, which the Claimant was attending three times per week, were not working, and that surgery was appropriate. TR 34. On January 6, 2003, Dr. Brennan scheduled surgery for the Claimant. CX 6 at 28. The Claimant had a laminectomy L4-L5 with posterial fusion on February 24, 2003. CX 6 at 38. After surgery, the Claimant improved slowly, but remained limited in his activities. CX 6 at 41-49; TR 35. The Claimant engaged in more physical therapy after the surgery. TR 35. Claimant was administratively terminated from his position at EBC as of December 2003 due to the Employer's policy of automatically terminating employees who are on leave for more than eighteen months. TR 36.

The Claimant was released to light-duty work and vocational re-training as of January 26, 2004. TR 35. Claimant attempted return to EBC after this, but was told that the policy was not

to rehire any terminated employees until at least one year after termination. TR 37-40, 45. The Claimant stated that he plans to reapply for a position at EBC as soon as the one-year waiting period has run. TR 45.

The Claimant testified that his back injury causes him limitations in his activities. TR 41. At the hearing, however, the Claimant was unsure of the exact restrictions imposed by his doctor. TR 45-46. The Claimant testified that he cannot repeatedly lift heavy objects and cannot bend over for long periods of time. TR 41. The Claimant reported that he is able to climb stairs. *Id*. The Claimant testified that he cannot work in tight confines or lift things in awkward positions or stand for very long on hard surfaces, such as concrete or steel. *Id*. He also testified that he is uncomfortable sitting for long periods of time, and that walking irritates his back condition. TR 42. The Claimant takes Vicodin and ibuprofen for pain. TR 42. Claimant's injury affects his recreational activities as well as his work. The Claimant can no longer perform work on automobiles, landscape, or deep-sea fish. TR 56-57. In a letter dated April 5, 2004, Dr. Brennan, the Claimant's treating physician, assigned work restrictions which preclude the Claimant from lifting greater than twenty pounds, carrying greater than ten pounds, or standing or sitting for more than thirty minutes without changing positions.[2] EX 1 at 1, TR 80. Dr. James E. McLennan, M.D., a neurological surgeon and a clinical associate professor at Brown University, performed an independent medical evaluation on the Claimant and agreed that the Claimant is capable of performing light duty work. EX 6 at 1-4.

Micaela Black, a vocational field case manager with Concentra who provides vocational services to facilitate a return to work, testified on behalf of the Employer. TR 78-103. She is a certified rehabilitation counselor and a qualified rehabilitation counselor who has a Masters of Education in Rehabilitation Counseling. TR 78; EX 7. Ms. Black conducted a vocational assessment of the Claimant on June 24, 2004. TR 79. As part of this assessment, Ms. Black interviewed the Claimant and reviewed notes from Dr. Brennan and the Claimant's physical therapist, and a report completed by Dr. Glenn Goodman. TR 79-81; EX 1 at 1. In performing the labor market survey, Ms. Black used the work restrictions assigned by the Dr. Brennan. CX 1. Ms. Black found that security positions, assembly positions, delivery driver positions, dispatch positions, and machinist positions were all within the physical capabilities and experience of the Claimant. TR 82; EX 1 at 2. Ms. Black then found eleven positions with employers in the Rhode Island area within these job categories, and contacted them. TR 82-83; EX 1 at 2-6. Ms. Black determined, based upon the contact with the employers, that the Claimant has an earning capacity of $8.00- $15.00 per hour, or $320.00- $600.00 per week. TR 84; EX 1 at 6. Ms. Black qualified this response, however, by stating that the Claimant's most probable earning capacity is $10.00 per hour, or $400.00 per week, unless he could find work as a machinist, which would pay at the higher end of the range. TR 84; EX 1 at 6. Ms. Black also testified that if, in fact, the Claimant had never earned a high school diploma this would not change her opinion of his earning capacity. TR 86. She later admitted on cross-examination, however, that several of the

[2] The restrictions written by Dr. Brennan are not in evidence. The restrictions were, however, referred to by Employer's counsel at the hearing; TR 64; by Ms. Black at the hearing; TR 80; and were excerpted in the labor market report. EX 1at 1. Although the restrictions are not in the record, they are uncontroverted, and Claimant indicated that he can carry at least the amount indicated by the doctor. TR 41. Thus, I find that Ms. Black's representation of Dr. Brennan's report is accurate and I rely on the portions of the letter that are excerpted in the labor market report to determine the Claimant's physical limitations.

jobs which she identified, including two security positions, an assembly position, and a dispatcher position, did require applicants to be high school graduates, which might prevent the Claimant from being qualified to work in those positions if he had not in fact graduated high school. TR 88-96. According to Ms. Black's notes, the Claimant told her that he was a high school graduate. TR 97.

On his own initiative, the Claimant also saw Albert J. Sabella, M.S., a certified vocational rehabilitation counselor, on August 3, 2004. CX 7 at 1. Mr. Sabella's report indicates he also understood the Claimant to have graduated from high school. CX 7 at 2. Mr. Sabella developed an individual written rehabilitation program for the Claimant. CX 7 at 6. In this program, Mr. Sabella concluded that the Claimant required job placement services, continuing vocational counseling, and retraining for a new job. *Id*. Mr. Sabella did not identify any particular employment opportunities for the Claimant.

The Claimant testified as to his attempts to find work, both with the employers identified by Ms. Black, and on his own. TR 41-55. His attempts were unsuccessful.

B. Collateral Estoppel

Before ruling on the merits of the claim, I must respond to the Employer's argument that the Claimant is collaterally estopped from litigating the extent of his disability because of the Pre-Trial Order of the Rhode Island Worker's Compensation Court. EX3; Employer's Post-Hearing Brief ("EB") at 7. Judge Healy, of the Rhode Island Worker's Compensation Court, found in a pre-hearing order that the Claimant is partially disabled, as of March 3, 2004, and is able to perform light duty work. EX 3. The Claimant argues that collateral estoppel is inappropriate because there was never any hearing or trial in front of the Rhode Island Worker's Compensation Court and because the legal standards in the Rhode Island and Federal systems are different. Claimant's Post-Hearing Brief ("CB") at 17-18.

When an issue of ultimate fact has been determined by a valid judgment, the issue may not be litigated again between the same parties in a future litigation, and collateral estoppel is appropriate. *Chavez v. Todd Shipyards Corp*., 28 BRBS 185, 189 (1994). A prerequisite to collateral estoppel "is that the issue must previously have been necessarily and actually litigated." *Id*., at 189, citing *Ortiz v. Todd Shipyards Corp*., 25 BRBS 228 (1991). Put another way, "relitigation of an issue or claim will only be precluded in a second case where the parties or their privies have had a full and fair opportunity to litigate the claim or issue." *Wilson v. Norfolk & W. Ry. Co.*, 32 BRBS 57, 59 (1998). Additionally, collateral estoppel is inappropriate if there is a material difference in the legal standards between the two proceedings. *Bath Iron Works v. Director, OWCP*, 125 F.3d 18, 22 (1st Cir. 1997) (*Acord*); *see also Plourde v. Bath Iron Works*, 34 BRBS 45, 48 (2000) (discussing *Acord*, and reversing the application of collateral estoppel when the state worker's compensation scheme and the LHWCA "burdens of production and proof differ[ed] materially").

Applying these standards, it is clear that collateral estoppel does not apply to this case. First, the parties have not had "a full and fair opportunity to litigate" the issue of whether the Claimant was totally disabled, and as a result, there was never a final judgment on the issue. *See*

Wilson, 32 BRBS at 59. Rather, the document to which the Employer seeks to give collateral estoppel effect is merely a pre-trial order. EX3. By definition, a pre-trial order cannot have given the parties a full and fair opportunity to litigate, because a pre-trial order predates the hearing. Thus, the pre-trial order of the Rhode Island Worker's Compensation Court was not a final order produced after a full and fair hearing, and collateral estoppel is inappropriate.

Likewise, collateral estoppel cannot apply in this case because there is no evidence that the standards for total disability under the Rhode Island scheme and under the LHWCA are the same. EBC has shown no evidence of the applicable standard in the Rhode Island scheme. Further, the pre-trial order, which appears to be merely a form order, does not state the reasons for the decision or the standards applicable to the order. Thus, I cannot conclude whether the standards in the two schemes are substantially similar or are materially different. As such, I must deny the Employer's request for application of collateral estoppel.

C. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability

The Claimant is seeking temporary total disability, and is not seeking benefits for a permanent impairment. TR 7-8. Therefore, I find that the Claimant's disability is temporary as of September 24, 2001.

2. Extent of Disability

With regard to the extent of the disability, the Claimant seeks temporary total disability benefits from September 24, 2001 through the present time, or alternatively, temporary total disability benefits from September 24, 2001 through July 12, 2004, the date of the labor market survey, and temporary partial benefits from July 12, 2004 through the present time and continuing. CB at 19. A three-part test is employed to determine whether a claimant's disability is total: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee, which requires proof that "there exists a reasonable likelihood, given

the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air America, Inc. v. Director OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981).

I must first address whether the Claimant has made a *prima facie* showing that he was unable to perform his former job because of the injury that he sustained on September 25, 2001. In this case, it is clear that the injury placed a significant impediment to the Claimant's return to his regular duties. Dr. Brennan, the Claimant's treating physician, has imposed restrictions which include no repetitive bending or twisting, no lifting greater than twenty pounds, no carrying greater than ten pounds, and no sitting or standing greater than thirty minutes without changing positions.[3] EX 1 at 1. The Claimant was released for light duty work as of January 2004. TR 35. Dr. McLennan, the Employer's medical expert, and Ms. Black, a vocational expert, agreed that the Claimant is only capable of performing light duty work, and the Claimant's job as a machinist at EBC is rated as a medium strength job. EX1 at 1, EX 6 at 4. Thus, I find that the Claimant has established that he is unable to perform his former job as a machinist, and he has made his *prima facie* case.

Next, I must determine whether the Employer was able to rebut the Claimant's *prima facie* showing. EBC relies on the testimony of Ms. Black, her assessment of the Claimant's transferable skills and her labor market survey to meet its burden of establishing suitable alternate employment that is readily available in the Claimant's community for individuals of the same age, experience and education as the employee. EB at 10-12. After determining the Claimant's physical restrictions, work and educational background, Ms. Black performed a job search to identify positions the Claimant could perform, taking into account his age, experience, education[4], and physical limitations. Ms. Black originally identified eleven jobs in five occupational areas that would be suitable for the Claimant, including jobs in security and assembly, and jobs as a machinist, driver, and dispatcher. EX 1 at 2.

Ms. Black was able identify three security positions, three machinist positions, three assembly positions, one dispatcher position and one driver position for which she believed the Claimant was qualified. EX 1 at 2-5. It is necessary to examine each of these positions, to see if each was suitable for the Claimant, considering his age, experience, education and physical limitations.

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[3] The Claimant also testified about the limitations his injury places on him, including not being able to work in confined spaces, lift or carry heavy weights, bend, stand on hard surfaces for long periods of time, sit for extended periods of time, and or walk far distances. TR 41-42, 46. The treating physician, however, did not impose any walking restrictions.

[4] As noted *supra*, at section III A, both vocational experts with whom the Claimant met were under the impression that the Claimant had graduated high school. However, the Claimant testified at trial that he never graduated. I find that it is unlikely that both vocational experts could have been mistaken about this critical fact. Thus, for purposes of this decision, I will assume that the Claimant has a high school diploma. As such, the Claimant's argument that the labor market report is so inaccurate that it must be given no weight fails. CB 12-13. Moreover, even if the labor market report was not accurate with respect to the Claimant's high school education, it still would be relevant, as Ms. Black identified six jobs that did not require a high school diploma. EX 1.

The labor market survey identified three security positions, the first of which was with Professional Security, in Cranston, Rhode Island, and paid between $8.00 and $12.00 per hour. EX 1 at 2. The position required a high school diploma or GED. *Id*. The duties included observing and reporting activities and providing "security and safety of client property and personnel" and "making periodic tours to check for irregularities," "inspecting protection devices," and "monitoring entrances and exits, and movement of people and vehicles." *Id*. The Claimant applied in person to this position, but after speaking with a representative the Claimant determined that there was too much walking required in this position. TR 52. However, the treating physician did not impose any restrictions on walking, and the Claimant did not present other objective evidence of a specific walking limitation nor did he clearly articulate how far he was able to walk. In the absence of physician-imposed walking restrictions and the Claimant's vague testimony, I cannot credit the Claimant's statements that he cannot walk "long" distances. TR 52. Nevertheless, based upon the position description provided, it appears that this position could have required the Claimant to apprehend shoplifters. Physically intervening with shoplifters is not within the Claimant's physical capabilities. Thus, the Employer has failed to establish that this position was suitable for the Claimant.

The second security position identified was with IPC International, which had several openings in the Rhode Island area. EX 1 at 2. This position paid between $8.00 and $11.00 per hour. *Id*. The position required a high school diploma or GED, a valid driver's license, and a clean criminal record. *Id*. The employee would be required to "observe and report activities and provide security and safety of client property and personnel." *Id*. Depending on which site the employee was assigned to, he might have to perform surveillance, walking tours, inspect entrances and exits, and/or monitor individuals on site. Because the duties depended on which site the Claimant was assigned to, it is impossible to tell whether this security position was suitable for the Claimant's physical condition. Additionally, based upon the description provided, it appears that this position could have required the Claimant to apprehend shoplifters, and this is not within the Claimant's physical capabilities. Thus, the Employer has failed to establish that this position was suitable for the Claimant.

The last security position the labor market survey identified was with Blackstone Valley Security, in Providence, Rhode Island, which paid between $8.00 and $12.00 per hour. EX 1 at 3. The position required a high school diploma or GED, a clean criminal record, and required the applicant to be dependable. *Id*. Duties included monitoring surveillance cameras and brief walking tours. *Id*. The Claimant contacted this employer, but found that the position required too much walking. TR 52. However, as noted above, the Claimant's treating physician never imposed any walking restrictions and I have not credited the Claimant's vague statements regarding an inability to walk any distance. I find that this position was within the Claimant's physical capabilities and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. Therefore, I find that the Employer has shown that this position is suitable. Because the Claimant has no experience in security I find that it is likely that he would make a starting salary of $8.00 per hour.

The labor market survey identified several machinist positions suitable for the Claimant. The first was with Yates Rubber, which was located in Fall River, Massachusetts, approximately

27 miles from the Claimant's home. EX 1 at 3. Ms. Black visited this employer personally. *Id*. No particular credentials were necessary, but the employer preferred candidates with experience. *Id*. The job required the candidate to set up the operation of a plastics machine, feed the machine, and make minor repairs. *Id*. The position required the lifting of objects less than ten pounds and offered the opportunity to sit or stand. *Id*. The position paid approximately $15.00 per hour. *Id*. I find that this position was within the Claimant's physical restrictions and that this was a position the Claimant was capable of performing taking into account his age, experience, and education. Although this position is located 27 miles from the Claimant's home, I find that it is within his local community.[5] Therefore, the Employer has demonstrated that this position is suitable.

The second machinist position the labor market survey identified was with Mahr Federal, Inc., which was located in Providence, Rhode Island. *Id*. This position required previous experience with machine operation, honing operation or CNC programming. *Id*. The employee would be responsible for operation and maintenance of the machine. *Id*. The position required no heavy lifting, and allowed the employee to change positions as needed. *Id*. The position paid between $12.00 and $15.00 per hour. *Id*. The employer required previous related experience with "machine operation, honing operation, and/or CNC programming." *Id.*. I find that this position was within the Claimant's physical restrictions and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. Therefore, the Employer has demonstrated that this position is suitable. I would expect that Claimant's starting salary in this position to be near the low end of the salary range as he has no specific experience with CNC machines but rather has general machining experience.

The third machinist position was with Walco, and was located in Providence Rhode Island. EX 1 at 4. This position required the candidate to have five years of related experience. *Id*. According to Ms. Black's notes, the employer felt that the Claimant's work experience to that point would qualify as related experience. *Id*. The employee would be responsible for setting up the machine and operation of the machine. *Id*. The position paid between $12.00 and $15.00 per hour. *Id*. The report, however, provides only this in regards to the physical requirements of the job: "Employer more likely to accommodate highly experienced Machinist as needed." *Id*. There is no information about how much lifting or carrying an employee would be expected to do, how much bending or standing is involved, or whether an employee could change positions from time to time. Thus, from this statement alone, it is impossible to tell whether the Claimant would be physically capable of performing this job. Therefore, the Employer has failed to demonstrate that this position is suitable for the Claimant.

The labor market survey also found three assembly positions suitable for the Claimant. The first was with Venturi staffing partners, in Pawtucket, Rhode Island, and paid $12.00 per hour. *Id*. The employer "highly preferred" candidates with experience. *Id*. The position required electrical assembly of small parts and units, fabricating and forming coils, and inspecting for malfunction or deformity. *Id*. The position was predominantly sedentary, and allowed the employee to change positions as needed. *Id*. I find that this position was within the

[5] The Board has found that jobs located 65 and 200 miles away are not within the local geographic area. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114, 118-119 (1977) *aff'd, sub nom. Diamond Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

Claimant's physical restrictions and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. Therefore, the Employer has demonstrated that this position is suitable.

The second assembly position was with Uvex (Bacou-Dalloz), located in Smithfield, Rhode Island. *Id*. The position paid $8.50 per hour. *Id*. The employer required applicants to have a high school diploma or GED and "excellent hand dexterity." *Id*. The position required the employee to assemble protective eyewear, from a seated position, with the ability to change positions as needed. *Id*. I find that this position was within the Claimant's physical restrictions and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. Therefore, the Employer has demonstrated that this position is suitable.

The third assembly position was with Ceramics Processing. EX 1 at 5. It was located in Chartley, Massachusetts, approximately 25 miles from the Claimant's home. *Id*. The position paid $8.00-$10.00 per hour. *Id*. The employer required no particular qualifications, but experience was "a plus." *Id*. The employee would be responsible for assembly of electronic and thermal products for packaging and shipping. *Id*. The assembly would not require lifting in excess of 10 to 20 pounds. *Id*. I find that this position was within the Claimant's physical restrictions and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. I also find that this position was within the Claimant's local community. Therefore, the Employer has demonstrated that this position is suitable. Because the Claimant's background is not in assembly, but in machining, I would expect him to earn on the low end of the range provided.

The labor market survey also found a position as a driver for the Claimant. *Id*. This position was with Maral Sales and Paper, in Cranston, Rhode Island and paid $10.00 to $12.00 per hour. *Id*. The position required applicants to have a clean driving record, a valid driver's license, and "excellent interpersonal skills." *Id*. The employee would be responsible for making local deliveries, and would not be required to lift more than twenty pounds. However, it is unclear whether this position required carrying more than ten pounds, or whether the position would have allowed the Claimant to change positions periodically. Thus, I find that the Employer has failed to show that this position was within the Claimant's physical limitations and that this position was suitable for the Claimant.

The last position the labor market survey identified was as a dispatcher with the town of West Warwick, Rhode Island which paid $14.00 per hour. *Id*. This position required a psychological and general physical examination, a high school diploma or GED, and a valid driver's license with a "clean background." *Id*. The position was mostly sedentary, with an opportunity to change positions as needed. *Id*. I find that this position was within the Claimant's physical restrictions and that this was a position the Claimant was capable of performing, taking into account his age, experience, and education. Therefore, the Employer has demonstrated that this position is suitable.

In summary, I have found that the Employer has identified one security position, two machinist positions, three assembly positions, and a dispatcher position for a total of seven

positions as suitable for the Claimant in light of his physical restrictions, age, education and experience. Even assuming, for the sake of argument, that the Claimant did not have a high school diploma the Employer has identified several position which I have found suitable and which do not require a high school diploma. Accordingly, I conclude that the Employer has successfully countered the Claimant's *prima facie* showing of total disability.

As the Employer was able to establish that suitable alternative employment exists, the Claimant may now rebut the Employer's showing with evidence establishing a diligent, yet unsuccessful attempt to obtain that type of employment. The Claimant testified regarding his employment search and submitted documentation of his search. TR 47-55, CX 8. Claimant testified that he contacted representatives of all eleven employers identified in the labor market report. The Claimant stated that he first applied to Maral Sales, but the position had already been filled at the time he applied. TR 49. Likewise, the Claimant applied to the dispatcher position with the Town of West Warwick, but the position was filled. TR 50. The Claimant reported that he contacted Professional Security and Blackstone Security, but he determined after speaking with representatives of those companies that the positions involved too much walking. TR 52. The Claimant called IPC International, but found that the security position identified had been filled. *Id*. Claimant also spoke to representatives from Yates Rubber, Mahr Federal, Walco, Venturi Staffing Partners, Uvex, and Ceramics Processing, but found that those positions had all been filled. TR 53-54.

The Claimant also testified to his attempts to obtain employment based upon his own efforts and research. On June 15, 2004, the Claimant sent a resume to Service Mechanic, Inc., but states that he did not get a response. TR 47. The Claimant applied to Aqua Science on June 15, 2004, but found that it involved heavy lifting and thus was not within his physical capabilities. TR 47. On June 25, 2004, the Claimant applied for a position as an assembly person at Bike Tech, but that job would have required too much heavy lifting and was thus beyond the Claimant's physical abilities. TR 47-48. The Claimant made no attempts to find work in July 2004. CX 8 at 1. On August 8, 2004, the Claimant also interviewed for a position as a CNC operator at Porta Machine, but did not hear back from the employer after the interview. TR 48, CX 8 at 1. Claimant put in an application with Geotech for an assembly position on August 9, 2004, but never heard from that company. TR 50, CX 8 at 2. On August 13, 2004, the Claimant applied for a position as a CNC operator with Seaside Casual Furniture, and had a short interview, but was told that the position was filled and that the employer would hold his resume for the future. TR 50-51, CX 8 at 2. Claimant also applied for a position as a pipefitter with Engineered Technologies on August 20, 2004, but never received a response. TR 51, CX 8 at 3. Lastly, the Claimant interviewed for a position at AstroMed, but the employer refused to hire the Claimant because the employer was afraid that the Claimant would leave quickly, as the rate of pay was fairly low. TR 55.

Although the Claimant has contacted some employers in an attempt to secure employment, I conclude that his attempts were insufficient to show a diligent effort to obtain alternate employment. The Claimant made only three attempts to find work in June of 2004, and none in July 2004. CX 8 at 1. In August of 2005, the Claimant did contact the employers identified in the labor market report, but he stated the jobs were filled by the time he contacted the employers. However, the labor survey shows jobs of this nature were available. The

Claimant contacted only three employers beyond those identified in the labor market survey, for a total of fourteen in August. CX 8 at 1-5. The Claimant also testified that during all of September and the first two weeks in October, he only made two attempts to find employment. TR 65. Thus, in the Claimant's entire four to five month job search, he contacted only nineteen employers, eleven of which were found by the labor market report.[6] I do not believe that these attempts rise to the level of a diligent search.

Additionally, I find that the Claimant never clearly articulated his physical restrictions to potential employers. In order to hire a person with physical restrictions, an employer needs to have sufficient detail of the prospective employee's abilities so that the employer may determine whether the employee can perform the job requirements. Based on the Claimant's testimony, I do not believe that he ever gave an employer sufficient information to make this type of determination. He testified that he never received the specific restrictions written by his doctor, and simply tells prospective employers that "I can't bend over for a long period of time, and I can't lift heavy weights on a repetitious basis from a low position. I tell them that I have the capability to perform duties but I can't go and carry 100 pounds across the – I can't lift 75 pounds off the floor." TR 45-46. In my view, this is not a clear articulation of his work capabilities and limitations that would permit prospective employers to clearly and realistically determine whether the Claimant could perform the specific job requirements the employer is attempting to fill. In my view, part of the Claimant's duty to perform a diligent search for employment includes the responsibility for clearly identifying his work limitations for prospective employers so they can make informed hiring decisions. The Claimant did not fulfill this responsibility as he was vague as to his specific work restrictions. Therefore, I find, based on the relatively few attempts to contact prospective employers, and the lack of a clear articulation of his physical limitations, that the Claimant has failed to rebut the Employer's showing of suitable alternative employment with evidence of a diligent attempt to obtain employment.

Consequently, I find that the Claimant's disability was total from September 25, 2001 to July 11, 2004, and is partial from July 12, 2004, (the date the labor market survey was completed), to the present and continuing. *See Palumbo v. Director, OWCP*, 937 F2d 70, 77 (2d Cir. 1991) (holding that a total disability becomes partial as of the date that the employer establishes suitable alternate employment).

I must now determine the Claimant's earning potential. I have found that seven of the positions outlined by the labor market survey are suitable for the Claimant, taking into account his age, experience, and education. These jobs range in wage from $8.00 to $15.00 per hour. Ms. Black testified that the most probable wage the Claimant was capable of making would be $10.00 per hour, or $400.00 per week. TR 84; EX 1 at 6. I credit Ms. Black's testimony on this point and I find that the Claimant's earning potential is $10.00 per hour or $400.00 per week. The Claimant's earning potential is $291.97 less than his average weekly wage in his former position at EBC, which was $691.67.

[6] The Claimant did not follow through with some of the employers, notably the security position which I have found was within his physical capacity to perform.

D. Compensation Due

The Claimant is entitled to both total and partial disability benefits. The Claimant is entitled to temporary total disability benefits equal to 66 2/3 per centum of the Claimant's average weekly wage at the time of injury. 33 U.S.C. § 908(b). At the date of injury the Claimant's average weekly wage was $691.67 and 66 2/3 % of the Claimant's average weekly wage is $461.11. Thus, the Claimant is entitled to receive $461.11 per week from September 24, 2001 to July 11, 2004, which is the date the employer established suitable alternative employment through the labor market survey.

The Claimant is also entitled to temporary partial disability compensation benefits. Temporary partial disability benefits are equal to two-thirds of the difference between the Claimant's average weekly wage at EBC, before his injury, and his earning capacity presently, for a period not to exceed five years. 33 U.S.C. § 908(e). Therefore, EBC must pay the Claimant $194.65 per week, which is equal to two-thirds of $291.97, which is the difference between his earning capacity presently, $400.00 per week, and his average weekly wage before his injury, $691.67 per week, beginning July 12, 2004, to the present and continuing, for a period not to exceed five years.

E. Entitlement to Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 94-95 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). There is no dispute that the Claimant's back condition is related to his work at Electric Boat. The Claimant is, therefore, entitled to medical care for the condition. As the responsible party, the Employer in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer shall to continue to pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related back condition. *Colburn v. Gen. Dynamics Corp.,* 21 BRBS 219, 222 (1988).

F. Credit

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due." 33 U.S.C § 914(j). This provision allows the employer a credit for its prior payments of compensation against any compensation subsequently found to be due. *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447, 451 (1989), *on recon., aff'd*, 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989). The parties have stipulated that the Employer has paid benefits to the Claimant under both the LHWCA and under the Rhode Island Worker's Compensation Act for the same back injury. TR 6-7. Accordingly, the employer is entitled to a credit for all disability benefits paid under the LHWCA and the Rhode Island Worker's Compensation Act.[7]

[7] The parties agreed on the record to submit evidence of the compensation payments made to the Claimant for this injury to the undersigned after the hearing. TR 7. However, the parties failed to provide evidence of the amount

G. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file a fee petition. The Employer will have 15 days from the entry of the Claimant's fee petition to file any objection.

IV. ORDER

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Mark Desautels, temporary total disability payments, pursuant to 33 U.S.C. § 8(b), from September 25, 2001 to July 11, 2004, in the amount of $461.11 per week;

2. The Employer shall pay to the Claimant temporary partial disability payments, pursuant to 33 U.S.C. §8(e) in an amount equal to two-thirds of the difference between the Claimant's average weekly wage at EBC before his injury and his earning capacity presently, or $194.65 per week, from July 12, 2004 to the present and continuing for a period not to exceed five years;

3. The Employer is entitled to a credit for any disability benefits previously paid;

4. The Employer shall provide the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related back injury may require pursuant to 33 U.S.C. § 907;

5. The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any response;

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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paid under the Rhode Island Worker's Compensation Act. As the parties did not provide specifics as to what benefits were paid under the Rhode Island Act, any credit due the Employer will have to be administratively determined by the District Director, OWCP.